

1 UNITED STATES DISTRICT COURT
 2 DISTRICT OF MINNESOTA
 3 FOURTH DIVISION

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 6 In Re: St. Jude Medical, Inc.) File No. 01-MD-1396
 7 Silzone Heart Valves Products)
 8 Liability Litigation.)
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 11)
 12) Minneapolis, MN
 13) February 12, 2004
 14) 10:00 a.m.
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 11 BEFORE THE HONORABLE JOHN R. TUNHEIM,
 12 UNITED STATES DISTRICT COURT JUDGE
 13 (STATUS CONFERENCE)

13 APPEARANCES

14 For the Plaintiffs: STEVEN E. ANGSTREICH
 15 JAMES T. CAPTRETZ
 16 JOE D. JACOBSON
 17 J. GORDON RUDD, JR.
 18 CHARLES S. ZIMMERMAN
 19 PATRICK J. MURPHY

17 For the Defendants: STEVEN M. KOHN
 18 DAVID E. STANLEY
 19 TRACY J. VAN STEENBURGH
 20 LIZ PORTER

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24 Proceedings recorded by mechanical stenography;
 25 transcript produced by computer.

1 (February 12, 2004, 10:30 a.m.)

2 THE COURT: Good morning.

3 COUNSEL: Good morning, Your Honor.

4 THE COURT: Good to see you all today.

5 This is civil case number 01-1396 in re: St.

6 Jude Medical Incorporated, Silzone Heart Valves

7 Products Liability Litigation. Counsel, would

8 you note your appearances today.

9 MR. CAPRETZ: James Capretz for the class.

10 MR. ANGSTREICH: Steven Angstreich for the
11 class.

12 MR. ZIMMERMAN: Charles Zimmerman for the
13 class.

14 MR. JACOBSON: Joe Jacobson for the class.

15 MR. MURPHY: Pat Murphy, State's liaison
16 counsel.

17 MR. RUDD: Gordon Rudd for the class.

18 THE COURT: Good morning to all of you.

19 MR. KOHN: Steven Kohn for St. Jude
20 Medical.

21 MR. STANLEY: David Stanley for St. Jude
22 Medical.

23 MS. PORTER: Liz Porter from St. Jude
24 Medical.

25 MS. VAN STEENBURGH: Tracy Van Steenburgh

1 for St. Jude.

2 THE COURT: And good morning to each of
3 you. We're present today for our regularly
4 scheduled status conference. The Court has
5 reviewed the report that was filed and the
6 agenda and other matters that are in process.
7 Mr. Capretz.

8 MR. CAPRETZ: Yes, Your Honor. Good
9 morning again. Your Honor, I'd like to, if we
10 could, a housekeeping matter, perhaps just talk
11 about our agenda and our time frame. As I
12 understand, the Court has a trial scheduled for
13 later today. But before I do any of that, I'd
14 like to acknowledge that I guess we form
15 somewhat of a family in this litigation, and
16 that we've traveled together to Las Vegas like
17 a comedian, even though they may be our
18 estranged members of family.

19 We do have a special occasion today. Your
20 Honor, I'd like to acknowledge on the record
21 that the gentleman, Gordon Rudd, has his 40th
22 birthday today. We want to greet him
23 officially as his 40th birthday.

24 THE COURT: We'll duly note the
25 congratulations.

1 MR. CAPRETZ: Let the record suggest --
2 okay. And one other thing, Your Honor, the
3 defense has asked for the opportunity, as we go
4 through the agenda, to respond to the various
5 points as opposed to my going through the
6 agenda and then their responding which we said,
7 of course, was fine.

8 So we can start with the plaintiff's
9 motion to reconsider. That is almost complete
10 in its briefing. We have the brief of the
11 defendant due -- I think it's due the 25th or
12 something like that of this month. And then if
13 we choose to respond, we have three days to do
14 that. So by the end of February, the Court
15 should have our motion to reconsider in total.
16 Do you want to add anything to that point?

17 MS. VAN STEENBURGH: I can.

18 MR. CAPRETZ: Sure.

19 MS. VAN STEENBURGH: Good morning, Your
20 Honor. I think in the joint status report, it
21 was a little confusing as to -- there were a
22 couple of points with respect to the motion to
23 reconsider. One is our response is due on the
24 25th and then their reply. But there's also a
25 reference in there to additional briefing on

1 the Medical Monitoring. We are going to submit
2 our additional briefing on the remaining states
3 on the 25th, as well, if they can respond.
4 There was something to the effect of a
5 decertification motion. If and when that
6 happens, that would be later once there's a
7 trial plan. So I don't want any confusion in
8 terms of what was written in the joint status
9 report. But you will get the additional
10 briefing on the 25th on those other states.

11 THE COURT: That's helpful. Thank you.
12 Ms. Van Steenburgh.

13 MR. ANGSTREICH: Your Honor, in that
14 regard, if I might. Your Honor addressed the
15 question of those additional jurisdictions and
16 I assume that once we get their submission, if
17 we wanted to challenge any aspect of it, we
18 would have some opportunity to do that.

19 THE COURT: Absolutely. Do you -- what
20 kind of a time frame works --

21 MR. ANGSTREICH: The shortest window
22 possible that we could do it in. Ten days
23 would be fine --

24 THE COURT: What, if any, response that
25 you happen to have would be ten days after.

1 MR. ANGSTREICH: Very good. Thank you,
2 Your Honor.

3 MR. CAPRETZ: The next item, Your Honor,
4 under the agenda is a proposed motion to
5 decertify the consumer fraud class and our
6 request for temporary stay of discovery.
7 Perhaps it best, although we have some strong
8 opinions on both issues, I yield to defense
9 counsel to explain their position.

10 MR. KOHN: Good morning, Your Honor.

11 THE COURT: Good morning, Mr. Kohn.

12 MR. KOHN: Let me start with the motion to
13 decertify. I think this Court, on page five of
14 the order of January 5th, acknowledged the fact
15 that the Court has the right, in fact, the
16 continuing duty to decertify a class action
17 based upon new developments. And that the
18 plaintiffs do have a burden -- a continuing
19 burden to demonstrate that the reported class
20 meets the requirements of Rule 23. The
21 acknowledgement by this Court is supported by
22 two U. S. Supreme Court decisions, the Coopers
23 and Lybrand decision as well as the General
24 Telephone Decision and there are a number of
25 Court of Appeal and District Court decisions

1 around the country that -- citing those cases
2 have discussed this issue. So I don't think
3 it's even subject to debate that even a
4 certified class, whether it's conditional or
5 unconditional, at any time, based on changing
6 developments, can be decertified on motion by
7 the defendant.

8 In this instance, the plaintiffs imply in
9 their joint status conference statement, the
10 position they've taken there, that there really
11 haven't been any changed developments and,
12 therefore, what we're proposing is nothing more
13 than a motion to reconsider. I think that that
14 ignores a number of important things that have
15 occurred since this Court issued its initial
16 order in March of last year.

17 And I'm going to quickly go over what we
18 believe to be the significant developments that
19 gave rise to, we believe, an appropriate timing
20 for a motion to decertify. First and foremost,
21 in the wake of the Court's order of March of
22 last year, we took a 23(f) petition to the 8th
23 Circuit. Now the 8th Circuit, denied that
24 motion without prejudice to bring it again as
25 premature. And it did not, of course,

1 articulate the reasons why it felt that it was
2 premature, but I think we can infer that the
3 lack of trial plans for any of the classes,
4 whether certified conditionally or otherwise,
5 may well have been part of the reason. And
6 another part of reason may be the fact that the
7 Court conditionally certified two of the three
8 classes. In any event, it made no attempt in
9 denying the 23(f) petition to say that St. Jude
10 Medical is precluded down the road from
11 bringing another 23(f) petition, depending upon
12 how events unfolded.

13 Subsequent to that, the parties spent many
14 months briefing, at the Court's request, the
15 sub-class issues as to the Medical Monitoring
16 class and as to the personal injury class.

17 Very little ink was devoted to the
18 condition of the consumer protection class by
19 either side. And ultimately on January 5th
20 when the Court issued its order, the landscape
21 of this litigation changed dramatically because
22 the personal injury class was decertified and
23 the scope of the Medical Monitoring class was
24 altered substantially. Needless to say, the
25 Medical Monitoring class is still conditionally

1 certified and the overall outlines of it we
2 really don't know, and probably won't know
3 until the briefing is completed and the Court
4 has an opportunity to rule.

5 With respect to the consumer protection
6 class, however, the Court acknowledged in its
7 January 5th order that the priority of that
8 class and the viability of that class is really
9 in question because of the rulings on Medical
10 Monitoring and on personal injury.

11 And it's against that backdrop that the
12 plaintiffs only recently filed their trial
13 plan. The trial plan itself, I think, will
14 form the cornerstone of our motion to
15 decertify, because after reviewing it, we
16 believe that the trial plan, combined with the
17 Court's rulings in the order of January 5th,
18 constitute changed developments, serve as the
19 basis for a motion to reconsider, and without
20 going into all of the different aspects of what
21 we believe are fundamental flaws in the trial
22 plan, the bottom line is that we believe that
23 the trial plan does not meet Rule 23; that the
24 class action format is not the superior method
25 of resolving these cases; that the trial plan

1 presents some very significant claims splitting
2 7th amendment issues and other constitutional
3 issues, and all of those will be front and
4 center when we propose to file our motion to
5 decertify on March the 9th.

6 Depending upon how that motion unfolds,
7 St. Jude Medical, at that point, may or may not
8 consider it right to take the issue to the 8th
9 Circuit, but clearly the issue is not right to
10 take the 8th Circuit at this point in time,
11 given all of the major developments that have
12 occurred, in particular, only having just
13 recently received a trial plan. And it's
14 probably worth noting that many courts have
15 refused to even certify class action when no
16 trial plan has been before the Court.

17 So I don't know if the Court wants me to
18 defer comments on the stay and give counsel an
19 opportunity to respond, and then I'll address
20 the stay when they get done with that.

21 THE COURT: Very well; thank you, Mr.
22 Kohn.

23 MR. KOHN: Thank you, Your Honor.

24 THE COURT: Mr. Angstreich.

25 MR. ANGSTREICH: Your Honor, I'm not

1 certain that this is now a 7.1(g) request for
2 reconsideration or a suggestion that they be
3 given an opportunity to go to the 8th Circuit,
4 or that they be allowed to file for
5 decertification. The Rule 23 does not require
6 the filing of a trial plan. The Supreme Court
7 of the United States has not required a trial
8 plan for class action. Some Courts have
9 requested trial plans where there are such as
10 the class two attempt with all of the various
11 state laws that might render a trial
12 unmanageable and it goes to manageability
13 issues.

14 The UDAP class is a simple class. It's
15 the Minnesota case law, Minnesota Statutes,
16 Minnesota case law that will apply and the
17 remedies that the Minnesota Courts afford under
18 the UDAP statute. Contrary to Mr. Kohn's
19 statement, Your Honor did not foreshadow a
20 motion to decertify. In fact, Your Honor said
21 in the January 5th order that the consumer
22 fraud lost class will remain certified.

23 There is an issue -- and I think that can
24 be addressed and it would be addressed as far
25 as the notice is concerned with the issue of

1 potential claims splitting and that relates to
2 those people who would seek the UDAP
3 restitutionary damage claims who also have a
4 viable stand-alone personal injury claim.
5 Those people have the right -- not the
6 defendant -- but those people have the right to
7 decide whether or not they want to opt out of
8 the class for restitution and not allow them --
9 allow that claim to go forward on their behalf
10 to have a bar order as a result, or to waive
11 that right and allow St. Jude to argue in their
12 personal injury action claims splitting because
13 you're staying within the class. That is the
14 right of the individual claimant. It is not
15 St. Jude's right to say that that creates the
16 problem. If the notice affords -- and we've
17 submitted the notice to the Court -- that
18 opportunity. That's the only issue.

19 To say that the landscape changed; nothing
20 has changed. We've given the Court the trial
21 plan consistent -- 100 percent consistent with
22 the Court's directive, which was, there's a
23 consumer fraud case under Minnesota's laws.
24 That's what the trial plan says and it's going
25 to be a simple trial. To say that at every --

1 at every day of the week they can come forward
2 with another motion to decertify because we
3 have a continuing burden, that's not what the
4 rule says.

5 The case was certified. We are now a
6 month and seven days past the last order after
7 I don't know how many trees went down to deal
8 with the first motion for class certification
9 and the address of the reconsideration, which
10 it really was, that we argued before Your Honor
11 that Your Honor ruled on January 5th. If we
12 have an opportunity to fight decertification
13 and then recertification and then
14 decertification and a stay of discovery, which
15 we'll talk about, we'll never get this case
16 done.

17 This makes little or no sense. This is
18 not a case that calls out for any kind of an
19 argument about manageability because we simply
20 don't have those issues. And our plaintiffs
21 have been found to be adequate representatives
22 by Your Honor. There's been no opportunity to
23 challenge -- I mean they had their opportunity
24 to challenge it. You can't keep coming back
25 every time you'd like to have the case delayed.

1 So we think that the Court has the power
2 to tell St. Jude today isn't the day and
3 March 9th isn't the day for decertification;
4 that nothing, in fact, has changed. And as
5 Your Honor told us when we asked for leave to
6 have you reconsider the class two, Your Honor
7 has the power to consider, no, I'm not going to
8 reconsider it. Nothing has changed and we
9 think that ought to be the situation with
10 respect to this.

11 THE COURT: Mr. Kohn, did you want to --
12 do you have something else, Mr. Capretz?

13 MR. CAPRETZ: I do want to add something,
14 but I'll defer to Mr. Kohn.

15 MR. KOHN: Go ahead.

16 MR. CAPRETZ: Your Honor, there is no
17 motion in front of the Court at the present
18 time. I'm a bit confused as to what, other
19 than for delay purposes, St. Jude Medical is
20 raising these arguments because I heard Mr.
21 Kohn make various arguments about the validity
22 of their position and their ability to proceed
23 following on March 7th. But there's nothing
24 before the Court at this time. I suggest to
25 the Court, as I'll get into it in a few

1 minutes -- this is nothing but a delay tactic
2 and it's premature for us to be talking about
3 making any -- whether or not decertification
4 motion is adequate when we haven't had an
5 opportunity to read anything that they're
6 proposing. I'd like to hear what Mr. Kohn has
7 to say.

8 MR. KOHN: I'm surprised to hear that the
9 primary objection is delay because there's no
10 reason why our motion can't be submitted,
11 briefed and ruled on long before any purported
12 trial might occur. We're not talking about a
13 delay. We're talking about a fundamental right
14 that defendant has to challenge certification.
15 I don't know what the plaintiffs have to fear
16 here. They have the burden to demonstrate that
17 their trial plan meets Rule 23. We don't
18 believe they can do it. We believe there are
19 significant legal issues that they need to
20 address and we're proposing to tee those issues
21 up in just a few weeks. So there's not any
22 delay and they have nothing to fear. If their
23 position is sound, their class will remain
24 intact; if not, they should be decertified.

25 THE COURT: What about the request for a

1 stay of discovery that's associated with it --
2 this and the prospect of some settlements, a
3 rationale for it.

4 MR. KOHN: Let me address that next, Your
5 Honor. The request for a stay of discovery,
6 again, is not going to delay the ultimate date
7 when cases are going to get remanded. If you
8 go back to the original scheduling order, the
9 cutoff for mediating these cases is envisioned
10 to be in September or October of this year.
11 What we're doing with the End Game Committee,
12 the appointment of a mediator and sitting down
13 and attempting to resolve approximately 50 -- I
14 don't think that's the correct number of the
15 individual cases is taking a process that was
16 envisioned probably to occur much later in the
17 game and putting it up right now to see if we
18 can't make some progress.

19 I have been through significant settlement
20 processes on these cases, not on the MDL, but
21 in the state courts, and I'm well aware of the
22 number of settlements St. Jude has entered into
23 around the country and how those settlements
24 have been undertaken. And by and large, with a
25 few exceptions, the settlements -- and there

1 have been many of them; well over 50 individual
2 cases -- have been settled, having been done
3 without significant discovery being taken by
4 either side -- any fact-specific discovery.
5 That, I think, has worked to the benefit
6 ultimately of the people bringing the lawsuits
7 because not a lot of unnecessary expenses have
8 been incurred. We are now at a point in this
9 litigation where we have obtained all of the
10 medical records for these 40 to 50 cases, with
11 a few exceptions that we're still attempting to
12 get on some of the newer cases and update
13 records on the older ones.

14 But the point is that we are now in a
15 position to evaluate these cases for
16 settlement. We have submitted names to the
17 Court on mediators that we agree upon and some
18 of the names overlap, so I'm fairly confident
19 that both sides can agree on other mediators,
20 if not today, perhaps within a few days and
21 that we can very quickly put in place some kind
22 of a structure for addressing these cases.

23 I will say, just based on my experience,
24 that the amount of time and energy that's going
25 to be necessary to make this effective is not

1 insignificant. These cases are all around the
2 country and are complicated cases and if this
3 settlement program is going to be effective, a
4 lot of time and energy of people in this
5 litigation on both sides is going to have to be
6 devoted to getting this done.

7 Against that backdrop, we now have a
8 cutoff of fact discovery on May the 5th. If
9 that cutoff remains in place, St. Jude Medical
10 will have no alternative but to take
11 approximately 200 depositions, perhaps more in
12 these individual cases, because at this point
13 in time, none of the implanting doctors, the
14 explanting doctors in those cases where there
15 have been explants or, for that matter, even
16 the plaintiffs have been deposed.

17 We're going to have to go down that path
18 and take those depositions, and by the same
19 token, on the consumer fraud case, we're going
20 to depose a number of physicians, including the
21 implanting physicians. We may well take 200 to
22 300 depositions between now and May 5th. By
23 the same token, counsel for the plaintiffs have
24 indicated that they would like to depose ten
25 St. Jude employees or current employees. If

1 we're going to do that at the same time we're
2 doing all of this briefing and at the same time
3 we're trying to sit down and resolve these 50
4 cases, all I can say is that a very limited
5 amount of time and energy is going to be
6 devoted to the settlement process. If we want
7 this settlement process to be effective, I
8 think we have to dedicate ourselves to getting
9 it done. If it isn't resolved, these cases
10 aren't able to be settled, then we can
11 undertake all of this discovery and I think
12 we're going to know the answer to that very
13 quickly.

14 THE COURT: The request is for an -- is it
15 a 90-day stay of discovery or just a 90-day
16 extension to the fact discovery cutoff?

17 MR. KOHN: It's actually a 90-day
18 extension. In other words, we would take no
19 deposition discovery for the next 90 days, we
20 would dedicate ourselves to getting these cases
21 resolved and setting up the mediations and,
22 obviously, we would have progress reports along
23 the way to see how we're doing. But at the end
24 of the day, we're going to know, I would expect
25 within 90 days, whether we're successful in

1 settling either all or significant number of
2 these cases or not. At that point in time,
3 assuming we were successful, the number of
4 fact-specific depositions that we need to take
5 is going to be dramatically reduced and it may
6 well be, depending upon how the briefing on the
7 motion to decertify comes out, that the number
8 of depositions that plaintiffs need to take may
9 be reduced as well.

10 All I can say is that we are not talking
11 about a delay in the remand down the road. All
12 we're talking about is an opportunity to make
13 some progress toward resolving these cases
14 without putting unnecessary burden on either
15 side.

16 THE COURT: Mr. Capretz.

17 MR. CAPRETZ: Yes, Your Honor. This is a
18 very sensitive spot with yours truly as far as
19 the delays. I first preface my remarks by
20 saying Mr. Kohn said this is not a delay and he
21 doesn't understand how we're suggesting it is.
22 Again, remind the Court there is no motion
23 pending. The Court has made ruling, the
24 plaintiffs have proceeded we have done what
25 we're supposed to do, and we're now asking for

1 a stay. I'd like to clarify -- I would say the
2 class would have no objection to allowing
3 them -- providing our end dates are still the
4 same -- some extended periods of time to carry
5 out their particular individual case discovery,
6 if that's necessary.

7 But let's get the facts straight. First
8 of all, yes, they have settled approximately 50
9 cases or thereabouts in this state court, but I
10 can say personally that over a year, we have
11 been talking about resolving these cases. They
12 called our -- for a conference in July in San
13 Francisco. We've made presentations; they said
14 they weren't prepared to make any counter
15 presentations. They'd meet in a month from
16 July -- the latter part of July date. Here we
17 are in February; the second meeting has not
18 been scheduled. So this business and this
19 suggestion that the settlement process is going
20 to go forward and suddenly there's going to be
21 an epiphany and settling all of these claims is
22 rather astounding for me and very difficult to
23 absorb as being a good-faith offer or proposal
24 to the Court.

25 St. Jude Medical has not acted that way;

1 they have not acted responsibly in addressing
2 the claims in a timely fashion, and there's no
3 reason why we should be delayed in proceeding
4 with our merits on a class action as well as on
5 the individual cases.

6 What is not addressed is what happens when
7 they can't negotiate a case or mediator can't
8 resolve the case. We want, by the fall of this
9 year, to have those cases to be in a position
10 to be remanded.

11 This recall took place, Your Honor, in
12 January of 2000; we're four years down the
13 road. Let me mention just a few things.
14 Textbook defense research institute lawyering
15 by the counsel as for St. Jude Medical. Number
16 one, they are asking for a discovery delay;
17 number two, they are saying that they are going
18 to make a motion to decertify the consumer
19 class.

20 It's not before you, but they said they
21 are going to do it. They suggested remove it
22 from the agenda, but had it in a joint status
23 report that they may be, possibly could be
24 filing a request for interlocutory appeal. In
25 this regard, I would do as the words of Mr.

1 Bush and now Mr. Carey Greenwell (phonetic),
2 let's see it, if they are going to do an
3 interlocutory appeal, let's do it now. I think
4 this is nothing but an attempt to intimidate
5 the claimants to a settlement value that is
6 less than what it truly is. The document
7 production, 60 documents were released recently
8 voluntarily much like the silzone recall by St.
9 Jude Medical.

10 Now I would ask the Court to consider some
11 of the documents that they had marked as on
12 that privilege log. One was a financial -- the
13 report they made to the financial analyst of
14 what they were doing. This was a public
15 document. They were on open phones. They had
16 a script; they read the script. Some of the
17 matters that were included were such things as
18 a letter that was translated from a French
19 doctor, meeting notices. It goes on and on and
20 on. Of the 60 released documents -- because
21 they would have been embarrassed, in my view,
22 if Mr. Slocum had looked at this and tried to
23 find a reason for the privilege law. So this
24 is nothing but a continuing effort on the part
25 of St. Jude Medical to delay justice.

1 To bring home the point, Your Honor, let
2 me, if I may, comment on one of the things they
3 said when they did the release in January of
4 2000. The company's primary objective is
5 patient safety. We are, therefore, acting in a
6 conservative manner in withdrawing the product
7 from the market. This is one of the statements
8 they made publicly on their website and to the
9 financial analyst. Now let me read you what
10 the letter from Dr. Robin Frater said. St.
11 Jude Medical is recommending to its clinician
12 customers that the usual admonition to keep
13 scheduled appointments and report all changes
14 in symptoms be emphasized for patients
15 implanted with valves having the silzone-coated
16 sewing cups. In addition, physicians should
17 allow all normal monitoring and follow-up
18 processes adequate to identify complications or
19 symptoms. So what do we have now? We're
20 getting release documents. Here's a document
21 that was released from St. Jude Medical in
22 February, less than one month after the
23 announcement. AVERT patients with evidence of
24 paravalvular leak should be monitored
25 closely -- this is not public; this is

1 internal -- should be monitored closely and
2 should have echocardiograms monthly for at
3 least three months and less frequently
4 afterwards according to the clinician's
5 directions. Now, this was information they had
6 less than a month after they did the recall.

7 Let's read one other piece of evidence.
8 The French doctor -- that was one of the
9 documents that they just recently released --
10 wrote to his colleagues in the French community
11 about what was going on. Now this is a
12 gentleman that was either a consultant or one
13 of the ones with whom they worked in selling
14 and marketing their valves.

15 Information to the general practitioner
16 and the cardiologist with patients which have
17 received a cardiac implant coated with silzone
18 should be notified of the necessity of a
19 rigorous monitoring of the efficiency of the
20 anticoagulation treatment in light of risk of
21 thrombolytic complications occurring mainly
22 under the form of TIE.

23 So this, Your Honor, I suggest was also in
24 the spring -- well, just starting the end of
25 winter, 3-24-2000. Here the general public is

1 being told and our claimants, our class, that
2 there is no need for monitoring; just do your
3 normal monitoring. There's nothing unusual.
4 If the patient presents certain symptoms of
5 cardiac problems, then, maybe you'll want to do
6 some testing. Internally they knew -- in
7 February and March, the doctors were saying,
8 great doctors that they employed to conduct the
9 study and a French doctor that they had
10 employed to relay the message of the recall
11 were told careful monitoring of this patient is
12 necessary for two separate reasons. PV
13 leakage, number one; and two, the thrombolytic
14 complications. So this is an outrage, Your
15 Honor. It's very insulting; it's an insult to
16 the patient, puts them in the position of
17 peril.

18 Mr. Kohn, at the last meeting when I had
19 suggested that we had been contacted by a
20 gentleman who lived in the Sierras who actually
21 lived in San Francisco at the time he had his
22 valve implanted knew nothing, knew nothing
23 about the silzone issue, and was only on a
24 recent visit to a cardiologist and an internet
25 connection, he learned about the silzone

1 problem. So this is a serious health public
2 interest matter.

3 St. Jude Medical continues to take it
4 lightly, continues to flaunt the Federal Rules
5 of Procedure and continues to ask for
6 unreasonable -- or make unreasonable request
7 for delays.

8 We suggest to this Court -- and we'll be
9 talking about this a little further about the
10 necessity for notice, but we suggested to the
11 Court that there's nothing pending other than
12 what was on the agenda. We're not hear to
13 argue the motions of what might be. If they
14 want to bring the motion, bring them on, make
15 their motion and let's address the motion.

16 MR. ANGSTREICH: Your Honor, before Mr.
17 Kohn responds, I wanted to add to the
18 presentation Mr. Capretz made.

19 The mediation or mediator role was not, as
20 we envisioned, simply to deal with 40 or 50
21 individual cases; it was to deal with the whole
22 case. That was the first point. The second
23 point is this is an MDL. Suddenly the tail is
24 wagging the dog. The individual cases that got
25 put into the MDL, which would benefit from the

1 generic discovery that we're supposed to take
2 to benefit them is now bringing to a halt the
3 MDL and we're being told the MDL should step
4 aside so they can negotiate with these 40 or 50
5 people. Well, they could have done that for
6 the last four years, but they chose not to do
7 it, for whatever reason; I have no idea. And
8 then within the 90 days -- and this is very
9 important because this is on the agenda and
10 this is critical. We need to get a notice out
11 to people and they want to delay the notice
12 because they want to come forward with a
13 decertification.

14 And although I agree with Mr. Capretz that
15 there is no motion on presently before you,
16 it's our position that there can't be a motion
17 brought before you and that the Court can tell
18 St. Jude today not to file a motion on March
19 9th or, alternatively, if you are going to file
20 a motion on March 9th, we're not going to delay
21 going forward; we're going to address the
22 notice; we're going to allow the discovery.

23 And quite frankly, unless we finish the
24 generic discovery, the individual cases and
25 case-specific discovery is an irrelevancy.

1 We're supposed to help the individual cases
2 establish basic liability. They have the
3 responsibility to take the next step, which is
4 to establish the causation for their particular
5 client's injury. That's what it's all about.
6 Suddenly case-specific discovery is now being
7 used as a club to beat the MDL into submission
8 and to stop us going forward.

9 It really is -- it's an outrageous
10 situation. There's no need to stay discovery
11 for 90 days. If they want to seek
12 interlocutory relief from the 8th Circuit with
13 respect to pre-emption, with respect to the
14 certification, the unconditional certification,
15 let them do it, but let's not stand here at
16 another status conference a month after the
17 last one where we all were, I thought, directed
18 toward moving this case to finality and say,
19 let's take a step back before the motion for
20 class certification was even filed. It
21 shouldn't be permitted and Your Honor has the
22 power to tell them, let's go forward.

23 THE COURT: Okay, Mr. Angstreich. Anybody
24 else have anything? Mr. Kohn.

25 MR. KOHN: Your Honor, Mr. Capretz didn't

1 seem quite so exercised in December when we
2 settled the first of the state court cases, so
3 I'm a little surprised to see him so exercised
4 now. I'll reiterate what I've said before. We
5 have evaluated his cases, we evaluated the
6 individual cases in the MDL, and given the time
7 in the next 90 days, we'll make a concerted
8 effort to see if we can resolve as many of
9 these cases as possible. Doing this discovery
10 at the same time is not going to be something
11 that will further that process; it will detract
12 from it, if not totally eliminate our ability
13 to participate in it in a meaningful way.

14 To respond to what Mr. Capretz said about
15 what he implied was some kind of a
16 life-threatening issue here to the patients.
17 Let me make it abundantly clear, that AVERT
18 investigators have continued at tremendous
19 expense to St. Jude Medical the type of trial
20 which even their experts acknowledge is the
21 best scientific evidence available about the
22 health of these patients. The AVERT
23 investigators have never recommended for
24 patients around the country or anywhere else
25 any kind of increased monitoring, nor has the

1 FDA, nor has any professional medical
2 association. There is absolutely no evidence
3 whatsoever of any increased risk to any silzone
4 patient who's had the valve in place more than
5 18 months. The latest AVERT data, which was
6 just released and is going to be the subject of
7 an article, shows that, in fact, the risk of
8 para-valvular leak and explant in the silzone
9 population is actually less two years
10 post-implant than in conventional valve
11 patients. So this whole argument that there's
12 some kind of a life-threatening issue and we're
13 attempting to delay it simply is not supported
14 by the scientific facts.

15 As to the notice, there has been more ink
16 in medical journals, there has been thousands
17 of letters to cardiologists and cardiac
18 physicians by St. Jude. It's hard to believe
19 there's a patient on the planet who doesn't
20 know that they have a silzone valve. I'm sure
21 if Mr. Capretz looked long and hard enough, he
22 might be able to find an American citizen that
23 didn't know we had a war in Iraq; that's
24 possible. It's about as likely as finding a
25 silzone valve recipient who doesn't know they

1 have a silzone valves. We say the most
2 productive use of the resources is to get on
3 with mediations, see if we can resolve the
4 cases. We don't think that's going to result
5 in any delay whatsoever and the eventual remand
6 of these cases.

7 MR. ANGSTREICH: Just so the record is
8 clear, our experts do not believe that the
9 AVERT study today has any validity because it
10 is woefully underpowered and its findings are
11 suspect. We do believe that it is something
12 that St. Jude is going to hang its hat on, but
13 our experts have, in fact, said that any
14 findings or lack of findings -- actually any
15 findings would be meaningful because -- because
16 of its underpowering; that if there is a
17 positive finding, that means something, but the
18 absence of a negative in an underpowered study
19 is a meaningless fact. And our experts have so
20 stated that. So we didn't want that to appear
21 to be the case.

22 And while we do appreciate St. Jude
23 sending notice to all of our clients and all
24 class members about the risks of what this case
25 is about via the Dear Doctor letters that they

1 fought so hard not to let us see, it's still
2 our burden to give notice. It's still our
3 burden to tell these people what the case is
4 about. It's not theirs. Maybe they could pay
5 for it, but it's certainly not their
6 responsibility to write it. Thank you.

7 THE COURT: Mr. Capretz, you have
8 something to say on this matter?

9 MR. CAPRETZ: I have one closing comment
10 and we're ready to move on, if I may. The
11 gentleman suggests that their folks never did
12 say that they needed any additional monitoring.
13 I'd be happy to tender to the Court this
14 document dated February 13, 2000, from St. Jude
15 Medical, Heart Valve Division. A gentleman by
16 the name of Mark Sportsman sent to Tim Chase in
17 marketing. For obvious reasons, the paragraph
18 that the AVERT clinicians suggested, and that
19 is any AVERT patients with evidence of
20 paravalvular leak should be monitored closely
21 and should have echocardiograms monthly for at
22 least three months and less frequently
23 afterwards according to the clinicians'
24 discretion.

25 So I'm not quite sure what the gentleman

1 is referring to, but this is a document that
2 they released us from St. Jude Medical. I
3 don't want to get further into debate. I'd be
4 happy to furnish Mr. Kohn, St. Jude Medical,
5 with the affidavit of many, I mean many people
6 that contact us through the internet
7 principally about whether or not they have a
8 silzone valve. They don't have a clue. As a
9 matter of fact, most of them do not and may
10 have some post-operation complication, but they
11 have no clue as to whether they have a silzone
12 valve. That's sad, but that's true and this is
13 America and we're supposed to have all of this
14 communication, but the truth of the matter is,
15 most people have no clue. Some of them don't
16 know what kind of valve they have, much less
17 whether it's a silzone valve. That's what in
18 the real world we're finding daily.

19 I think we've said enough on the issue,
20 Your Honor. I urge you to deny any stay of
21 discovery. Again, class would be open to their
22 suggestion if they needed some sort of
23 extension, but nothing to impair us from moving
24 forward with the schedule that we have.

25 THE COURT: Just to say -- let me get this

1 part of the issue resolved. If the defendant
2 wishes to file a motion for decertification of
3 the consumer protection class on or before
4 March 9th, I will review it after reviewing any
5 response from the plaintiffs. I will note some
6 level of skepticism whether it will change
7 having examined the issue several times, but I
8 do think it would be useful for the Court to
9 take a sharper focus on the consumer protection
10 class apart from having the other class issues
11 pending.

12 So how much time would the plaintiffs like
13 to respond to that motion?

14 MR. ANGSTREICH: I assume that motion has
15 been in motion for many months now. I would
16 suspect that we will need at least three weeks,
17 Your Honor.

18 THE COURT: Well, let's have the response
19 due three weeks after receipt of the motion and
20 if, for some reason, it raises more complicated
21 issues than you anticipate, please let me know
22 and we can extend that date, if necessary.

23 MR. ANGSTREICH: Thank you, Your Honor.

24 THE COURT: With reference to the request
25 for a stay of discovery, the Court is not going

1 to resolve that today. The Court will consider
2 that only after there is an agreement on a
3 settlement master and a written plan for how
4 that process will take place and then the Court
5 will consider the motion at that point and
6 then, for now, the notice process that we have
7 embarked upon should continue.

8 MR. KOHN: Your Honor, point of
9 clarification. Will we be given an opportunity
10 to reply to the plaintiff's opposition? If so,
11 I propose ten days after they filed their
12 opposition.

13 THE COURT: That's fine.

14 MR. KOHN: Thank you.

15 MR. ANGSTREICH: Your Honor, could we keep
16 these to 35 pages total, which I believe -- is
17 it 35 pages?

18 THE COURT: Thirty-five pages per side is
19 the normal limit under the local rules of this
20 Court. I think that would be fine. I don't
21 think I need any more than that. Is there any
22 reason that you need more than 35 pages for
23 this, Mr. Kohn?

24 MR. KOHN: At this time, I don't think so,
25 Your Honor.

1 THE COURT: Okay. Mr. Capretz.

2 MR. CAPRETZ: Yes, Your Honor. The next
3 item on the agenda is a privilege log. It is
4 my understanding that Mr. Slocum has all of the
5 information that he needs to proceed, and I
6 don't know if anyone has any additional
7 information or comment on that.

8 MR. ANGSTREICH: Just to bring the Court
9 up to date, I received yesterday, I believe, a
10 36-page submission -- I guess the master could
11 go beyond 35 pages -- a 36-page submission on
12 why the documents are privileged in addition to
13 the privilege log and I have until the 20th to
14 provide any additional submission to
15 Mr. Slocum.

16 MR. ZIMMERMAN: Solum.

17 MR. ANGSTREICH: Solum. I don't know that
18 we're going to supply anything near the level
19 of that, but we will respond.

20 THE COURT: Okay. Very well.

21 MR. CAPRETZ: The next item on our agenda
22 is the deposition schedule. We have -- as has
23 been suggested to the Court, we have tendered
24 the names of ten individuals. Through this
25 morning, we have been unable to get but one of

1 those individuals, a person who no longer is
2 employed by St. Jude Medical, and I think his
3 deposition is scheduled for March.

4 MR. ANGSTREICH: 25th.

5 MR. CAPRETZ: In New Jersey. We have no
6 response from the other folks from St. Jude
7 Medical. We have at least -- we don't have,
8 like St. Jude Medical suggests, 200
9 depositions. We have at least another set of
10 ten that we're prepared to tender once we get
11 this underway. The first ones were obviously
12 ones we thought were the highest priority. But
13 I suspect St. Jude Medical was hoping that they
14 won't have to produce these people because
15 there might be a stay, but we need to move
16 forward. We need to have dates so we can plan
17 because all of us have schedules that we need
18 to adhere to.

19 THE COURT: Let me ask you this, Mr.
20 Capretz: These ten or remaining, I guess, nine
21 individuals that you have identified, is it the
22 plaintiff's position that depositions of these
23 individuals would be helpful to take place
24 before the settlement effort commences?

25 MR. CAPRETZ: Well, yes, Your Honor. I

1 think it's very important for the Court not to
2 confuse, as I think St. Jude Medical would like
3 to do, the issues. These are merit discovery
4 depositions for the consumer fraud and medical
5 monitoring claims that we're proceeding on as
6 well as merits discovery for the individual
7 cases. And while I certainly hope that St.
8 Jude Medical has a new view towards the
9 settlement process and moves forward in an
10 expeditious fashion, I'm not ready to bet the
11 farm on it, and I certainly don't think we
12 should delay these because, in any case, should
13 they have seen the light and resolve these
14 cases in a prompt manner, we still need -- we
15 still have our consumer fraud and medical
16 monitoring actions and some of these people are
17 simply not going to settle because they may not
18 offer enough or may not offer anything. We
19 need to get on with the schedule, Your Honor.

20 THE COURT: Mr. Murphy.

21 MR. MURPHY: Thank you, Your Honor. As
22 Your Honor knows, I don't often speak, but I
23 just would like to point out, I don't think the
24 individual settlement process is at all
25 mutually exclusive, intensely competitive or

1 logically analytical for proceeding with the
2 ten depositions in the MDL. They are totally
3 unrelated. I don't think Mr. Kohn or
4 Mr. Stanley or anyone is saying that if you
5 don't agree to this, we're going to take our
6 ball and go home. I think the mediation
7 process and the settlement process can go
8 forward, as well as these. I don't see where
9 they're, in any event, mutually exclusive. The
10 depositions that we're proposing are for the
11 class; they are not case specific, which is
12 what I think Mr. Kohn meant when he talked
13 about fact specific. I think he meant
14 case-specific depositions 200 plus. And I will
15 agree with him that would be a burden on them
16 and I think we should go forward to try to
17 mediate those cases and I think we're all in
18 agreement to mediate the individual cases, but
19 it's not in any way an impediment or should not
20 in any way be an impediment to the class doing
21 its generic discovery.

22 THE COURT: Thank you, Mr. Murphy. Mr.
23 Kohn.

24 MR. KOHN: Well, I will respectfully
25 suggest that these ten depositions get wrapped

1 into the Court's suggestion that we agree on a
2 mediator and a plan quickly. And I think we're
3 going to be able to do that and that it be part
4 of the Court's ruling on extending discovery.
5 Just to identify who these ten people are, one
6 is the former CEO of St. Jude Medical; another
7 one is our medical director, Dr. Robert Frater,
8 who lives in New York. Some of these folks are
9 engineers who are no longer with the company.

10 It's easy for them to say it's not much
11 effort to produce these people for deposition,
12 but, in fact, it is. It may not be much effort
13 for them, but it's a lot of effort for us
14 especially since seven of them are no longer
15 employees and have other jobs and so forth. So
16 for us to be scheduling these and preparing
17 these people for depositions at the same time
18 we're working on other issues is a burden on
19 us. And I think that if the Court is inclined
20 to let these depositions go forward, there's no
21 reason why they can't go forward in April or
22 even May; that's not going to delay anything.
23 And at that point in time, will have finished
24 the brief on the consumer fraud class and we'll
25 know where we stand on the settlement issue.

1 MR. ANGSTREICH: Your Honor, we certainly
2 don't want to burden Mr. Kohn, Mr. Stanley, any
3 of the 500 lawyers at Reed, Smith, Crosby,
4 Heafey. If these former employees are
5 difficult to deal with, all they have to do is
6 give us their name and address and we'll
7 subpoena them and their schedules so that we
8 can meet dates. And we'll take the burden and
9 we'll subpoena them. They don't have to chase
10 these people down. We'll be more than happy to
11 do it if that's what's holding it up.

12 Certainly all of their in-house people,
13 how difficult could it be? Mr. Ladner, I'm
14 certain, could contact them, and reach out to
15 them and tell them they are going to be deposed
16 and we can go forward. So I can't see how
17 we're going to be delaying settling cases by
18 taking ten depositions. And, again, we'll do
19 everything that we possibly can to help them
20 get these people subpoenaed, if necessary.
21 Thank you.

22 THE COURT: Well, I will consider those
23 ten depositions as part of the request for a
24 stay under the circumstances that I've already
25 identified, but for now they should be

1 proceeding forward at least until the Court
2 says otherwise.

3 MR. CAPRETZ: Could we -- in order to
4 emphasize that, Your Honor, could we possibly
5 have a date mandated by this Court while the
6 gentlemen are most cordial and professional
7 with us. I'm not sure the problem lies with
8 counsel at the front table. If we could
9 possibly have a date by which they are to
10 provide us with dates for the corporate
11 deposition, we would certainly appreciate that.

12 THE COURT: Well, I will -- I'll take that
13 into account when I rule on the motion for a
14 stay. I think for now, the parties should
15 continue to try to move forward to set up
16 dates. I won't set any deadline right now. If
17 I allow these to go forward, even if I do grant
18 a stay, I will set a deadline.

19 MR. CAPRETZ: Thank you very much.

20 The next agenda item is at the heart, the
21 true heart, in my view, Your Honor, of this
22 status conference and we appreciate the Court
23 calling this conference sort of quickly from
24 our January 1 status conference. And this is
25 the heart of the proceeding with the case as

1 the Court mandated at the time of our January
2 status conference.

3 I, quite frankly, in all due respect to my
4 colleagues across the table, think it's a lot
5 of smoke and delay and procrastination with all
6 of these proposed motions, potential motions,
7 reconsideration ideas. The truth of the matter
8 is, we need to get on with the case management
9 order, our two-track schedule, as this Court
10 suggested it was open to, the trial of the
11 consumer fraud class and a schedule for the
12 class medical monitoring claim.

13 We have submitted -- I'd like to try to
14 address these in more detail. The trial plan
15 as has been suggested by the Court, we have
16 heard nothing. We had a meet and confer. At
17 that time, our lead -- our senior counsel for
18 St. Jude Medical suggested there were a lot of
19 problems and issues and questions and we
20 continuously said, tell us what they are;
21 identify what they are. Do anything, send us
22 an e-mail, communicate. We have heard nothing,
23 nada, from this point in time.

24 And on the Medical Monitoring claim that's
25 on the separate step or track, we can talk

1 about that, and as -- the true essence of the
2 dispute at this point, is the notice to the
3 class. We have proposed a notice be sent out;
4 we have heard nothing, nada on that notice
5 request, and we're suggesting it is time to
6 move forward with these items. It's critical
7 to the plaintiff's claims. Steve, you want --

8 MR. ANGSTREICH: Your Honor, if I might on
9 the class notice and the meet and confer. We
10 offered St. Jude an opportunity to give us what
11 they believe to be necessary within the
12 framework of the trial plan, because they said
13 that there were certain major issues there. We
14 didn't get any response and that's why we
15 submitted what we did and we haven't heard
16 anything with respect to what we overlooked,
17 what the problems were. Again, no response.
18 But with respect to the notice, they have now
19 been provided with the notice. I believe it
20 was delivered today or yesterday.

21 What we're suggesting, Your Honor, is a
22 very short window be given to counsel to come
23 back to us with suggested changes, whether
24 that's five days or ten days; that we then
25 attempt to address their concerns and try to

1 rewrite the notice. And if we cannot, that
2 within a week after that, the parties appear
3 before Your Honor, and we suggested local
4 counsel do that. We don't need to convene
5 another full status conference to address the
6 notice, because if we wait another 30 days for
7 the next status conference, we're, again, going
8 to delay getting the notice out to the class.
9 So our hope is that Your Honor would say today,
10 seven days to respond to the notice, seven days
11 thereafter or five days thereafter for us to
12 meet and confer, and then if we can't reach an
13 agreement on the form of the notice, then have
14 Your Honor schedule -- we could contact Lou
15 Jean, and then have the Court schedule a
16 conference to resolve that.

17 I guess the first primary issue is, the
18 objection I am certain is going to come from
19 St. Jude's that there should be no notice sent
20 out at this time. I think that -- although we
21 have two hurdles, one is the actual language of
22 the notice, the other is Your Honor's decision
23 that, in fact, absent the stay, I assume from
24 the 8th Circuit, that the notice can go out.
25 So that would be our proposal. Thank you.

1 THE COURT: Mr. Kohn.

2 MR. KOHN: With respect to the notice,
3 Your Honor, it was handed to me this morning.
4 I have not read it. I can't possibly say we
5 can respond in seven days without having an
6 opportunity to read it. We will certainly
7 respond as quickly as we possibly can. I don't
8 know how many issues are raised by the notice,
9 but I think seven days is unreasonable. I
10 would propose that we respond to them at least
11 within ten days to two weeks and I don't know
12 whether we can agree or disagree on the notice.
13 I suspect that we are going to have to look at
14 our motion to decertify and look at how the
15 notice may implicate that. But in any event, I
16 think seven days on something we were just
17 handed this morning is inappropriate.

18 With respect to a trial plan which Mr.
19 Capretz talked about for the consumer fraud
20 class, I think that must await the Court's
21 ruling on our motion to decertify. And beyond
22 that, I just think it's -- that there's not
23 much we can say. The issue of their trial plan
24 is going to be addressed in our motion to
25 decertify. It forms the cornerstone to

1 decertify. It's not our job to tell them how
2 to write a trial plan; it's their job to come
3 up with a trial plan that meets the
4 requirements of Rule 23. They haven't done it
5 and we're going to show the Court that they
6 haven't. That's what March 9th and our
7 submission will talk about.

8 MR. ANGSTREICH: Your Honor, if they need
9 ten days, we have absolutely no problem with
10 that. We can certainly put a clause or a
11 sentence in bold, if they want, in red and in
12 bold that St. Jude Medical intends to file a
13 motion to decertify the consumer fraud class.
14 That way everybody would be on notice that that
15 would be a potential, so we could deal with
16 that. Five days, seven days, ten days, that's
17 all -- that's all fine with us. Ten days would
18 be perfectly acceptable.

19 THE COURT: Okay. Let's proceed. I want
20 the notice process to proceed along as quickly
21 as possible. There's always an ability to
22 change it, if necessary, later on. Ten days is
23 an appropriate time period for responding.
24 Seems to me that the plaintiffs probably can
25 try to address concerns within seven days after

1 that.

2 MR. ANGSTREICH: At the outside, sure,
3 Your Honor.

4 THE COURT: After that point, if there's
5 no agreement, then you can meet and confer and
6 I think it's a perfectly good suggestion to
7 have local counsel handle that in the hearing
8 before the Court, if that becomes necessary.
9 But I would like to move this along quickly.
10 As to the trial plan, I do think that that
11 probably needs to await the Court's
12 consideration of the motion that the defendant
13 plans to file on or before March 9th. But I
14 don't see any reason why the notice process
15 cannot go forward full speed ahead while that
16 process is going forward.

17 What's next Mr. Capretz?

18 MR. CAPRETZ: Thank you, Your Honor. The
19 next is the fourth paragraph, the appointment
20 of mediator. We had suggested, as we have
21 advised the Court, several names. One
22 gentleman was selected, but unfortunately had a
23 conflict. Then last night or this morning, St.
24 Jude Medical had a suggested name. We are open
25 to considering that person. We believe this

1 matter of the appointment of a mediator should
2 happen sooner than later. If it's possible,
3 today would be great. I don't know if the
4 Court has the time or inclination to address
5 that or the parties would want to talk with
6 anyone, but certainly which -- we can work at
7 it and come to an agreement as early possible
8 because, as they said -- St. Jude Medical said
9 in their strong status report, they are ready
10 to proceed with a settlement protocol. In that
11 regard, Your Honor, we would have an
12 opportunity to meet and confer with St. Jude
13 Medical on structuring a plan how to approach
14 this because St. Jude Medical had suggested to
15 the Court that they would like to attempt to
16 negotiate certain without the services of a
17 mediator. On the other hand, in order to keep
18 the process moving, we should have some sort of
19 a protocol adopted by the Court as to what the
20 procedure will be for the employment of the
21 mediator that's chosen. So I'm sure we can
22 work that part out amongst the attorneys.

23 THE COURT: The Court had indicated last
24 hearing that if there's a mediator that both
25 sides can agree upon, the Court would be

1 receptive to appointing that person as the
2 settlement mediator, and short of that, the
3 Court could choose a mediator from the list
4 provided by the parties. But it sounds like
5 this process has moved along rather well. If
6 there was one person who has already been
7 identified who had a conflict, it seems like
8 there's another person can be identified and we
9 can get this process moving.

10 MR. ANGSTREICH: In fact, Your Honor --
11 I'm sorry, Tracy. There are three on the list
12 that Tracy gave to us this morning that would
13 be acceptable to us. We just need now to
14 caucus to decide which one of the three or in
15 what order, because it's conceivable that, like
16 the last one, the one we choose might have a
17 problem, might be unavailable, so we'll try to
18 get this up in an order format. If we can do
19 it today, we'll get back to them, but certainly
20 we would have our selection by the end -- the
21 end of the week is tomorrow.

22 MS. VAN STEENBURGH: Tomorrow.

23 MR. ANGSTREICH: We would be in a position
24 probably to do that by close of business
25 tomorrow, Your Honor.

1 MS. VAN STEENBURGH: Your Honor, Mr. Rudd
2 and I have to check with some of the mediators
3 in terms of their schedule. We agreed that we
4 would talk and hopefully by tomorrow we can
5 agree on a name.

6 MR. ANGSTREICH: We do need a
7 clarification that this mediator role is dual
8 both as it relates to the MDL and as to the
9 individual cases. I don't want any
10 misunderstanding that his role is solely to
11 mediate 40 or 50 individual cases and will have
12 no function in helping the parties mediate the
13 case itself.

14 MS. VAN STEENBURGH: That's something
15 we're going to talk about, then. Our
16 understanding is specifically for the
17 individual cases.

18 THE COURT: Before the Court gets involved
19 in that, why don't the two sides discuss that
20 matter and perhaps an agreement can be reached
21 on that. Okay. Good.

22 MR. CAPRETZ: The next item, Your Honor,
23 would be, since we're thinking positively, the
24 establishment of an escrow account. If the
25 Court recalls or the Court might refresh its

1 memory by reviewing PT018, that concerns the
2 establishment of an escrow account for the
3 receipt of funds of assessments levied in the
4 various case settlements, and we would like to
5 get that processed. It called for a date; I
6 believe it was January of 2003. We were a bit
7 optimistic, I suspect, at that time. But if
8 the Court would look at that PTO and advise how
9 it wishes to proceed. Basically, it was a
10 question of confidentiality of individual
11 settlements, that St. Jude Medical wants to not
12 let that be public, for obvious reasons, the
13 amounts of the settlement, so there was a
14 process established whereby aggregate amounts
15 would be reported to the co-lead counsel as to
16 the amounts in the fund from time to time --
17 periodically. I forgot if it's quarterly,
18 semi-annually, but we should get that account
19 open and we can be prepared to move forward
20 with the settlement process.

21 THE COURT: Anything -- okay, very well.
22 The Court will look at that right away.

23 MR. CAPRETZ: The next thing is an
24 appointment an End Game committee. I'd like to
25 push that to the end and just cover the other

1 two -- the first Canadian case litigation. I
2 don't think there's anything -- I'll yield to
3 Mr. Kohn if he wishes to add something to that,
4 but it's my understanding that what is going on
5 at the current time in the Canadian litigation,
6 is number one, the plaintiffs are preparing, if
7 they've not already prepared, an intended
8 motion to tax cost in a Canadian procedure.
9 Since they have been successful with class
10 certification, they are entitled to certain
11 costs and expenses, experts, and expenses and
12 attorney's fees. They are in the process of
13 doing that.

14 I think St. Jude Medical has the option of
15 appealing what has been done at this point in
16 time. And from the settlement perspective,
17 they've had one day or perhaps two of
18 settlement or mediation talks, and that has
19 broken off while other developments take place,
20 and it's to be resumed at such time as the
21 parties agree.

22 MR. KOHN: It's a little bit more
23 complicated than that, but very briefly, an
24 individual was appointed by the Court to try to
25 bring the two sides closer together, and

1 there's a process going on, would that person
2 be able to see if we can narrow the issues and
3 then go back to the Court? So we envision
4 maybe a 90-day process.

5 THE COURT: Thank you, Mr. Kohn.

6 MR. CAPRETZ: The other one we
7 inadvertently left off is the report in Ramsey
8 County. There really is nothing new to report
9 in that regard, other than the sense that two
10 cases are in the process of being set for
11 trial. This -- we have tentative dates in this
12 calendar year and we're meeting and conferring
13 with St. Jude Medical on proposed case
14 management orders in those two cases.

15 THE COURT: How many have been settled in
16 Ramsey County?

17 MR. KOHN: Over 40 cases, Your Honor.

18 THE COURT: And two remain?

19 MR. KOHN: More than two.

20 THE COURT: Two are severed for trial.
21 Two are on the trial calendar?

22 MR. KOHN: Right.

23 THE COURT: How many more remain?

24 MR. RUDD: I would say less than ten.

25 MS. VAN STEENBURGH: I was going to say

1 like eight.

2 THE COURT: Those are all consolidated
3 before one judge?

4 MR. CAPRETZ: Yeah, Gearin. Judge Gearin.

5 MS. VAN STEENBURGH: For pretrial.

6 THE COURT: For pretrial. Okay.

7 MR. CAPRETZ: The joint status report
8 accurately reports -- I think we're going back
9 to D, paragraph four on End Game Committee.
10 St. Jude Medical has given us four names, with
11 one being alternative between Dave Stanley and
12 Steve Kohn. Our group has asked for an
13 opportunity to discuss our committee with the
14 Court privately if the Court has the time and
15 inclination to do that.

16 THE COURT: That's fine.

17 MR. CAPRETZ: And the only other things
18 would be the next status conference to try to
19 set a date that works with us.

20 THE COURT: Okay. Let's look at dates in
21 March. How does the week of the 15th look for
22 schedules?

23 MR. ANGSTREICH: I believe that's fine for
24 me.

25 MR. CAPRETZ: Is that a Monday, Your

1 Honor?

2 MR. ANGSTREICH: 15th is a Monday.

3 THE COURT: The 15th is a Monday and the
4 week is fairly free, I think, for me at this
5 point in time.

6 MR. JACOBSON: I'm sorry. Which week?

7 THE COURT: The week of March 15th. I'm
8 just wondering if anyone has any substantial
9 conflicts.

10 MR. CAPRETZ: Not here.

11 MR. MURPHY: Yes. The 17th would be okay
12 with me, Your Honor.

13 MS. VAN STEENBURGH: That's a holiday for
14 Mr. Murphy.

15 THE COURT: How about the 18th? Would
16 that be considered a per se conflict?

17 MR. MURPHY: That's correct, Your Honor.

18 MR. JACOBSON: Being Norwegian, it's not a
19 holiday I normally celebrate, Your Honor.

20 Your Honor, we have an MDL which always
21 has a conference a day prior to St. Patrick's
22 Day, so I expect that it will again, although
23 it hasn't been scheduled yet.

24 THE COURT: I guess either the 18th or the
25 19th, Thursday or Friday of that week.

1 MR. ANGSTREICH: That's fine.

2 THE COURT: Thursday.

3 MR. CAPRETZ: Probably the Thursday would
4 be better.

5 THE COURT: Thursday.

6 MR. CAPRETZ: I think so.

7 THE COURT: What time would you prefer to
8 have it?

9 MR. ANGSTREICH: Your Honor, it's really a
10 function of what's going to be on the agenda
11 for the 18th of March. If we have a very short
12 agenda with no extensive argument, if we start
13 it at 11, I think based upon what I understood
14 people's plane schedules were, you can almost
15 do same day starting at 11. If we have a
16 longer calendar, then we probably need to make
17 sure we're doing it either after lunch or
18 earlier in the morning.

19 MR. CAPRETZ: We can't quite do same day
20 from California. We could come the night
21 before. We don't have a problem if the Court
22 wants to do it in the morning. Earliest
23 practical would be the 1:30 we got scheduled
24 before.

25 THE COURT: Let's set it right now for

1 11:00 o'clock, and I would expect the parties,
2 if they feel we need more time, to notify me in
3 that case, and we will change the time. I will
4 try to keep time available that day.

5 MR. ANGSTREICH: That's great, Your Honor.

6 THE COURT: Okay. Anything else for
7 today?

8 MR. ANGSTREICH: Your Honor, there have
9 been an indication at the last conference that
10 Your Honor was willing to entertain
11 off-the-record discussions with both sides if
12 there was anything further to discuss off the
13 record. I didn't think that there was. If
14 not, then the PSE would like the opportunity to
15 speak with Your Honor.

16 THE COURT: Very well.

17 MR. CAPRETZ: Mr. Kohn -- we had talked;
18 you said you were interested in it. Where do
19 you stand?

20 MR. KOHN: I think we have covered most of
21 issues, so I don't think there's anything we
22 need to stick around.

23 THE COURT: We've got a few major issues
24 here that are hanging, so it probably makes
25 sense to not have any additional discussion

1 now. Okay. Very well, we will see every one
2 next month on the 18th. And I trust Mr. Murphy
3 will be in good shape on that day.

4 MR. MURPHY: Your Honor, you realize I
5 will be flying on the 17th, which could be a
6 matter of --

7 MR. ZIMMERMAN: Are you the pilot?

8 MR. MURPHY: No, but there are certain
9 tests they do of passengers when they get on
10 the planes.

11 THE COURT: Thank you, everyone. And I'll
12 just -- the members of the plaintiffs committee
13 wishes to meet with me. We'll do that back in
14 chambers. Court's in recess.

15 * * *

16 I, Lorilee K. Fink, certify that the
17 foregoing is a correct transcript from the
18 record of proceedings in the above-entitled
19 matter.

20 Certified by:
21 Dated: March 10, 2004 Lorilee K. Fink, RPR-CRR

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